No. 10978

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MURRELL F. HAID,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
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Attorneys for the Appellee.

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
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INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant was convicted on three counts out of seven contained in an Indictment, each of them charging him with separate offenses against Section 76 of Title 18, United States Code. This Statute prohibits one from falsely assuming or pretending to be an officer or employee of the government, and thereby obtaining anything of value. The alleged offenses all occurred during the period from April 1, 1943 to July 31, 1944, while the defendant was operating a detective agency at Olympia, Washington.

The alleged charges grew out of his efforts to enhance his private detective business by falsely representing himself as having various offices, employments and connections with the government.

Commencing at page 5 of the appellant's brief, he sets forth a recital of what is termed the government's evidence in support of its charges, but because of the sketchy character of the appellant's resume of the evidence, we think it advisable to set out the additional evidence offered by the government in order that the full scope and extent of his misrepresentations and impersonations do not escape this court.

The additional evidence concerning Count I, which had to do with the appellant's transactions with Ruth McConkey are these: He told her he had been sent up here from Los Angeles by the government to oversee the program, contracts and things at Fort Lewis as a sort of undercover man (Tr. 36, 37, 38); that he was required to wear Army clothes by virtue of government regulations (Tr. 37); that his private detective work was merely to cover up his real reason for being here; that he could not discuss his government work as it was confidential in war time (Tr. 38). He not only carried a gun, but showed it to her on more than one occasion, and on one occasion he

said he had had the gun barrel cut down at Fort Lewis because of government regulations (Tr. 39); he told her he could put a man behind the telephone and listen to telephone conversations (Tr. 39).

On their trip to Portland after the children, when he had a blow-out, his first effort to stop a passing car was unsuccessful. So, he then pulled out his badge, saying: "That ought to do it", and stopped a car by flashing a badge (Tr. 39, 40). On this same trip he was stopped at Chehalis by the police for speeding. He talked himself out of that with the aid of his badge (Tr. 41); in addition to the $1225.00, which Mrs. McConkey paid him for services in connection with the children, he borrowed $100.00 from her upon his representation that his government check was slow (Tr. 42), and later when she tried to collect this $100.00 he again told her that the government was slow in paying him (Tr. 43); he told her that with his connections he could bring back her brother (Dr. Mathwig), and have him run the hospital (Tr. 44), that he had to account to the government for his hours; when she asked him for the records on the Mathwig children investigation he said, "No one gets those, they belong to the government" (Tr. 44). He told Mrs. McConkey's husband, Carl McConkey, that he had at one time been employed by the government in an investigation

which required his carrying the mail (Tr. 58). He displayed his gun and handcuffs to Mr. McConkey, saying that they were used in his official capacity (Tr. 59).

Count II charged an impersonation to Mrs. Gertrude Highmiller. The evidence in support of this count, in addition to that disclosed in appellant's brief is as follows: At the time Mrs. Highmiller's husband was a doctor in the Medical Corps overseas (Tr. 88); Haid told her that he was fingerprinting the school children upon the order of the government (Tr. 89). He stated to her that through his connections he could get a man behind the board at the telephone company to find out who was making the alleged anonymous calls to her. This, despite the Federal Communications Law (Tr. 90); he told her he had been sent from Texas to California to do special work for the Navy (Tr. 91). He told her he wore Army clothes, of which he had several pair, when doing special work at Fort Lewis (Tr. 92). He told her he could have his gun cut down at Fort Lewis, but because it would take two or three weeks there, he had it done at Olympia (Tr. 93).

On Count III the defendant was convicted. This count charged his impersonation to Mrs. Elizabeth Mathwig and son, Ralph Mathwig. Evidence con-

cerning this charge, in addition to that recited in the appellant's brief, is as follows: Ruth McConkey was the daughter of Mrs. Elizabeth Mathwig, and a sister of Ralph Mathwig, and it was through the defendant's employment by Mrs. McConkey that he came to know the Mathwigs. Mrs. Mathwig was an aged lady whose husband had died a long time ago, and she had some difficulty expressing herself in the English language (Tr. 76, 77).

On one occasion, when the defendant and his wife were at the Mathwig's residence, Haid beckoned Ralph Mathwig to come into a room out of the presence of the two women, and there he said to him, "I presume your sister (Mrs. McConkey) told you that I work for the government", and Mathwig answered "Yes". Haid then pulled out his badge, which the witness said had the words "Issued by the Department of Justice", and showed it to Mathwig. When Mathwig showed little interest in the badge, Haid specifically directed his attention to the wording on the badge. Haid cautioned him to keep mum, not to say anything to anyone (concerning his office with the government presumably). During this same conversation the FBI was mentioned by one or the other (Tr 69, 70).

Two or three times he wore Army pants and shirts and told Ralph Mathwig he had a right to wear them. The Army clothes were exactly like those worn by the witness' brother (Captain Mathwig, an officer in the Medical Corps). He said something about working at the Bremerton Navy Yard (Tr. 71 and 75). When Ralph demurred to having blue prints of the house made, because they would have to be changed, Haid said that the government did not care about that, that they would change it to suit themselves. When Haid told Mathwig about his connections in Washington, and with Senator Wallgren, he stated it with much more emphasis than the appellant discloses in his brief (Tr. 71). Mathwig not only saw him wearing his gun, but Haid handed it to him on one occasion (Tr. 73). He told Mathwig the same story he had told others concerning having the gun barrel cut down because of government regulations. He apparently always wore his handcuffs while in the presence of Mathwig (Tr. 74).

In relating the testimony of Mrs. Mathwig, appellant says on page 9 of his brief that she never saw his gun. This statement is not borne out by the record. She stated that he showed her his gun and put it on the table, and that he frequently handled his gun and handcuffs (Tr. 77 and 84). The appellant's brief states at page 9 that on one occa-

sion Haid gave her some meat points, but it omits the significant part of that testimony, which was her statement to him in connection with his giving her meat points that "You are a government man and giving me points", and he failed to correct her (Tr. 77 and 82). When he was looking over the drugs in Mrs. Mathwig's home he told her he had a right to take them. He also told her he could get the government to finish the hospital and to get her son to come back and run it. That he could accomplish this through his influence in Washington (Tr. 78). The $170.00 which Haid got from Mrs. Mathwig as a loan had not yet been repaid at the time of the trial. It was then long overdue (Tr. 79; plaintiff's exhibit 18). In addition to this $170.00 she had paid Haid approximately $250.00 as expense allegedly incurred in his efforts in behalf of the hospital (Tr. 80 and 83).

The defendant was convicted on Count IV. This count charged him with obtaining $100.00 from Laura Camfield by representing himself to be an FBI. Mrs. Camfield was a woman 72 years of age (Tr. 112). When Mrs. Camfield gave him the $100.00 it was in a $100.00 bill, and she said "Guess that is the largest piece of money you have had for a long time", and he said, "Oh no, I went down to California and brought back some prisoners. I got over

$2,000.00 for it" (Tr. 114). She asked him, "How does the FBI go about finding anyone like this?" And he answered, "Oh, we have ways to find them." She then asked him how long it would take, and he answered, "It will take a week or two weeks, or six weeks, but we will have her back." As with the others he showed her his gun. And after he gave her the receipt for the $100.00 (plaintiff's exhibit 32) he told her "We will put the FBI on the tracks right away". She thought he was an FBI and would not have paid him the $100.00 except for that belief (Tr. 114). When Haid first called on Mrs. Camfield he had a picture of her granddaughter for whom the reward had been offered, which he said he had obtained from the Sheriff. Haid never found the granddaughter (Tr. 115).

Mrs. Camfield's husband, C. H. Camfield, testified that when Haid first called he said his name was Haid, and he was from the Bureau of Investigation. He showed him his badge which was similar to plaintiff's exhibit 3, but in showing it he had his thumb over the top of it. He also showed them his gun that night. He testified that Mrs. Camfield asked Haid how many FBI there were in Olympia, and he answered there were three.

The appellant omits from his brief, in connec-

tion with the Camfield count, the testimony of Clara Gross and her son, William Gross. This was all part of the testimony in support of Count IV and briefly it was as follows:

Mrs. Gross testified she lived across the street from Walter Camfield, the father of the missing girl, and the son of Laura Camfield. Haid first called her on the telephone to inquire about the missing girl. The reward ad in the paper (plaintiff's exhibit 31) referred to Mrs. Gross' telephone number. After making inquiries about the girl in this telephone conversation, Mrs. Gross asked Haid who he was, and he said he was Mr. Haid from the FBI. They then arranged that he was to come out to see her (Tr. 118 and 120). Upon arriving at her home Haid showed her his badge, and she saw the words Bureau of Investigation, and thought it was Federal Bureau of Investigation. She also saw his gun. He took this from his holster, showing it to her and her son (Tr. 119).

The boy, William Gross, testified he was 14 years of age, and he was present the evening when Haid first called upon his mother. Pretty soon, after Haid showed his badge, which the boy did not see distinctly, he pulled out his gun. The boy offered to show him a gun he had similar to it, and invited him into

his room. There Haid said, "I use this gun in my business." The boy asked, "What is your business?" and Haid replied, "I work for the FBI" (Tr. 121).

The defendant was convicted on Count V, which charged him with representing himself to Everett Stuart as being a United States Marshal, and thereby obtaining an automobile tire and tube without surrendering a ration certificate. There was some testimony concerning this transaction by Mrs. McConkey. Stuart testified as follows in addition to that recited in appellant's brief: That Haid told him that he was a law enforcing officer, and was entitled to a tire in an emergency without a ration certificate (Tr. 61). Haid was talking about being a government man, and Stuart said to him, "Well I am going to let you have the tire since I do not believe Uncle Sam would put one of his own men in jail. If he does I will be right behind him, and we will both be in jail" (Tr. 61). From the reading on his badge, Stuart was convinced he was a government man (Tr. 63). Haid showed him his badge and he observed the words "Bureau of Investigation" (Tr. 60, 62, 63, 64). Haid told Stuart that he was on a seizure case. That he had been down to Oregon to get the girls, and was bringing them back to Olympia. Stuart understood that he was no common officer of Washington because he had crossed the interstate line (Tr. 60, 64, and

65). He believed he was helping an officer of the law and in such a case was entitled under the OPA to furnish tires until such time a certificate could be obtained. He was convinced that Haid was a law enforcement officer (Tr. 65). There was talk about Haid being a government man, which he did not deny and he would not have gotten the tire had Stuart not believed him to be a government man (Tr. 65, 66).

The additional evidence in support of Count VI is as follows: Mrs. Lillibridge's husband was a medical officer in the Army, and because of this enforced separation she was renting certain quarters at her home primarily to Army personnel and their wives so that they could be together (Tr. 104 and 108). He told her he had been sent up from California by the government to this defense area; that he had to have a telephone in his business, that he was doing work for the government, that he had been on special assignments in the South, and was much interested in finger printing. He mentioned his assignments for the government whenever there was an opportunity. He was taking finger prints of the school children in Olympia, and told Mrs. Lillibridge that they were sent to the Department of Justice. He said he was very busy with the government assignments, and so she should not use the telephone (Tr. 105 and 107).

His gun was always in evidence. He told Mrs. Lillibridge not to go near the house because it was wired, that if it burned down to let it burn, and that he kept the house locked and wired because there were very confidential matters in it, and he did not want anybody getting in (Tr. 105, 106).

Mrs. Lillibridge told Haid he would have to have a Coast Guard identification in order to use a boat which had been washed upon the beach. He answered that would not be necessary because his credentials and means of identification were so much better than the Coast Guard (Tr. 106).

Mrs. Lillibridge's daughter, Jean, age 19, testified that Haid told her on one occasion concerning some envelopes and papers on his desk, that they were some work he was doing for the government, and he was very busy (Tr. 108).

Additional evidence not recited by appellant concerning Count VII is as follows: When Haid told Mrs. Nelson his work was FBI-Secret Service, he also stated that the camera he was attempting to purchase was the kind he used in his work, and that it was essential to his work (Tr. 109 and 110). He told her a number of times he intended to use it for FBI work, and on one occasion she said, "That is a little strange, I did not know we had an FBI man here in Olympia",

and he answered, "Uh huh". He told her he was an FBI man, and she believed him and would not have held the camera for him except for that belief (Tr. 110, 111).

Other evidence produced by the government in support of the charges generally is as follows:

J. E. Stearns, a Deputy Sheriff for Thurston County, at Olympia, testified he had known Haid a year and one-half, or two years. He told Stearns he had worked for the government in Texas, that he had had a rigid course of training and instruction in that work. He told Stearns the government felt he was doing better work for the war effort in Olympia than he had been in Texas (Tr. 122).

Ellsworth Wood was a police officer for the city of Olympia. As a son-in-law of Mrs. McConkey he knew Haid well, having worked for him for a short period of time in the fall of 1943. He told Wood that he had worked for the Secret Service at a Navy defense plant in Los Angeles (Tr. 123). On several occasions he told the witness that he had worked for the Army Intelligence during the first World War and was now stationed in this district to work for the Army Intelligence. He was quite secretive about it. He told the witness he was working for the In-

telligence Unit of the United States Army (Tr. 123 and 128).

Wood testified that Haid generally dressed in Army officers' pinks. They were regular pinks, the same as were worn by regular commissioned officers (Tr. 123 and 125). He carried a gun and handcuffs (Tr. 124).

Orville R. Wilson testified: That he was an Agent of the Federal Bureau of Investigation, and had investigated the case against Mr. Haid. Mr. Wilson called on Haid on three occasions, August 21, August 24, and September 28, 1944. Haid showed him his credentials upon which he had his picture. In the picture he wore an officer's type cap, and an officer's type shirt. He explained to Wilson that the picture was one of him in his guard uniform taken while he was employed at a defense plant in California (Tr. 95, 96). Between Wilson's first visit and a subsequent visit to Haid, Haid changed his credential cards from "Haid's Bureau of Investigation" to "Haid's Detective Bureau" (Tr. 95; plaintiff's exhibits 4 and 22). He carried a gun and handcuffs and produced them from his person (Tr. 96). Wilson asked him if he ever used his credentials by placing his thumb over the word "Haid's", and saying "I am Haid of the Bureau of Investigation", and

Haid answered he had not done that. Asked what would be the implication if he had, Haid answered "That would have meant that he was Haid of the Federal Bureau of Investigation" (Tr. 96). He told Wilson on the occasion of his first visit to him that he was having his credentials changed to "Haid's Detective Bureau" because "Haid Bureau of Investigation" might be misconstrued to mean the Federal Bureau of Investigation, and that during war time he did not want any question of misrepresentation to arise (Tr. 97).

During the first and last visit of Wilson to Mr. Haid, Haid had his badge changed from "Haid's Bureau of Investigation" to "Haid's Detective Bureau" (Tr. 97). On Wilson's last visit he showed Haid his official FBI badge. Haid showed considerable interest in it, stating that it was not as impressive as the badges worn by FBI agents some years ago. He then described such earlier badge to Mr. Wilson, and the description he gave of the former FBI badges is strikingly similar to the badges which Haid himself was carrying (Tr. 97; plaintiff's exhibits 2 and 3). He admitted to Wilson that he had flagged down a passing motorist near Chehalis, Washington, on his trip to Portland, as had been testified by Mrs. McConkey, and told Wilson he intended to represent a law enforcement officer at that time, but

not a Federal Law enforcement officer. He would not state what type of law enforcement officer he was intending to represent (Tr. 98).

QUESTIONS INVOLVED

The issues on this appeal, as we interpret the appellant's brief and assignments of error, present two questions, they are:

(1) *Should the victims of the alleged impersonations have been allowed to testify they believed the defendant to be a government officer?*

(2) *Was prejudicial error committed in permitting the defendant's witness, Walter Camfield, to testify on cross examination that his mother, Laura Camfield, the alleged victim in Count IV, referred to the defendant as a detective of the FBI?*

Appellant's assignments of error, Nos. 1 to 5 inclusive are covered by the first question. Assignment of error No. 6 is the basis for the second question. Assignment of error No. 9 is apparently based upon the alleged error presented by the other assignments argued. We shall discuss the questions in the order stated as that is the order in which the issues are discussed in appellant's brief.

ARGUMENT

(1) *The Victims' Testimony That They Believed in the Defendant's Misrepresentations Was Properly Admitted.*

The burden of appellant's argument in answer to the first question is that the evidence of the several witnesses was opinion evidence, that it did not come within any of the rules permitting opinion evidence, and hence was inadmissible. We believe, and suggest, that appellant has misconceived the true nature of this evidence. It was not opinion evidence, but was direct evidence of a fact, the fact being the belief or state of mind of the witness testifying. A state of mind, or a belief, if relevant to the issues, is a fact subject to proof by direct testimony. A state of mind is no different than a state of digestion.

It should be noted that in each instance in which the court permitted a witness to testify that the witness believed Haid to be an officer of the government, that such witness was one of the alleged victims of his impersonation. These witnesses were, Elizabeth Mathwig and Ralph Mathwig, named as the victims in Count III (Assignments of Error Nos. 2, 3, and 4), and Everett Stuart, the alleged victim in Count V (Assignment of Error No. 1).

The appellant attempts to bring within the same issue his Assignment of Error No. 5, which is based upon the testimony of the witness, Clara Gross. This witness was not a victim designated in any of the counts of the Indictment. However, it is submitted that her testimony, to which appellant objects, is not in the same category as that of the other witnesses, and that she was not permitted to testify as to her belief or state of mind. The question and answer of Clara Gross, to which the appellant objects, is as follows:

> "Q. I want to show you Plaintiff's Exhibit 2 and ask you if that is the badge or similar badge to the one he showed you at that time?
>
> A. Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation" (Tr. 119).

The witness was there stating her recollection of the badge displayed to her by Haid.

A witness may testify directly as to his belief or state of mind when such belief or state of mind is material. The rule is stated in 20 Am. Jur. under the topic "Evidence" at page 312, Section 335, as follows:

> "The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in

> a case, and the person himself may testify directly thereto. Direct evidence of one's state of mind or of the belief which induced an act is not, however, necessary. A condition or state of mind may be shown by the accompanying circumstances as well as by the direct testimony of the party himself."

And again at page 314, Section 338, as follows:

> "It is now well settled that whenever the motive, belief, or intention of any person is a material fact to be proved under the issues of the case, it is competent to prove it by the direct testimony of such person, regardless of whether or not he is a party to the suit. * * * Thus, in suits involving fraud, which depend frequently upon equivocal acts, the direct testimony of the party as to his intention is generally admissible."

This same rule is affirmed in *Chicago N. W. Ry. Co. v. McKenna*, 74 Fed. (2d) 155, (C.C.A. 8). The suit was for damages for an assault. The court states at page 157:

> "Appellants offered to show by Barrett 'that he was in fear of his life and safety as a result of the assault plaintiff was making upon him with a knife and that is the reason that he shot in defense of his life and safety.' This offer was denied and objections to questions along a similar line were sustained, to which exceptions were preserved. The admissibility of testimony of a party as to his intent or motive depends upon whether intent or motive is a fact permissible to be proved under the substantive law involved in the case."

And again at page 158:

> "That a state of one's mind is a fact question to be proved the same as any other fact was in *Edgington v. Fitzmaurice,* 29 L.R. Ch. Div. 459, stated as follows, 'But the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else,' cited in *Rogers v. Virginia-Carolina Chemical Co.* (C.C.A.) 149 F. 1. In 10 R.C.L., Sec. 116, page 946, the following appears: 'The rule is well settled and supported by the weight of modern authority that whenever the motive, belief, or intention of any person is a material fact to be proved under the issue on trial, it is competent to prove it by the direct testimony of such person, whether he is a party to the suit or not.' "

In two cases in this court the same rule has been adhered to, they are:

> *Deal v. U. S.* 11 Fed. (2d) 3 (C.C.A. 9);
> *Walter v. Rowlands,* 28 Fed. (2d) 687 (C.C.A. 9).

The *Walter v. Rowlands* case was a suit upon a contract. Concerning a witness' testimony as to his belief, the court says, at page 690:

> "It is assigned as error that in answer to the question, what was his understanding of the condition of the C. A. Goodyear Lumber Company at the time of entering into the contract of March 23, 1923, Lamont Rowlands was permitted to testify that his understanding was that the com-

> pany was in a very serious condition, and that 'the report of the president to the stockholders indicated that'. It is objected that the testimony was proof, not of the fact of financial difficulties, but only of Rowlands' state of mind. To this it is to be said that the state of mind of the witness had been brought in issue by the plaintiff's contention that he had not acted in good faith in dealing with Henrietta Goodyear. The trial court ruled that the testimony was admissible, not as tending to show the financial condition of the corporation, but as going to the question of the good faith and the understanding of the witness when the contract was made and the source of the information on which he relied. Where the motive of a party in performing an act thus becomes a material issue or reflects light upon the same, he may testify concerning it, and his testimony is competent to be considered for the value which it may have on the question of good faith. Jones on Evidence (2d Ed.) Secs. 709, 710, and cases there cited."

In the *Deal* case, Deal was a Postmaster at Fairbanks, Alaska, and the action was a suit on his performance bond predicated upon a loss of money from a registered package as a result of his negligence. The court states at page 8:

> "The court properly denied the motion of defendants to strike out the testimony of Evelyn Houck, the register clerk in the post office that she believed the package contained money. This belief was material in determining the care that the package should receive. The defendant Deal was responsible for Miss Houck's acts and omissions."

According to this rule, the testimony of the several witnesses in this case that they believed Haid to be an officer or employee of the government was competent evidence, if their belief was material to the issues.

The counts upon which the defendant was convicted were all brought under the second clause of the statute (18 U.S.C. 76), which makes as one of the elements of the offense therein proscribed, that the offender "in such pretended character demand or obtain" something of value. This language of the statute implies, if it does not compel, that there must be proof that the alleged victim parted with the thing of value in reliance upon the "pretended character" assumed by the offender. If it is necessary, in establishing the charge, to prove that the victim relied upon the pretense of the defendant, then it is first necessary to show that the victim believed in the pretense and hence, the belief of the victim is a material matter.

That the victim's belief in the pretense of the defendant is a material matter seems to be the holding in the following cases, all impersonation cases under this statute.

In *Littell v. United States*, 169 Fed. 620 (C. C. A. 9) this court says, beginning at page 621:

"The plaintiff in error contends that there was no evidence to go to the jury to show that Mrs. Dabney *relied upon the representations* of the plaintiff in error that he was an officer of the United States in extending credit to him and loaning him money, and that the evidence shows, on the other hand, that the credit was given and money was loaned on other considerations, especially upon consideration of the relations resulting from the answer of the plaintiff in error to the advertisement of Mrs. Dabney and his subsequent engagement of marriage with her. This contention is not substainable. An examination of the record produces the conviction that the plaintiff in error, before going to Mrs. Dabney's house, deliberately planned to impersonate an officer of the United States falsely for the purpose of cheating Mrs. Dabney. He took pains to arm himself with indicia of the office which he claimed to hold. He brought to her house packages of papers which he exhibited to her and declared to be government papers. He displayed to her a badge which he represented to be the badge of his office. He often referred to the government property which he said was in his custody, to the burdens of his official duties, and to his anxiety about the Federal Building and the delay in its construction. All of these things were sufficient to impose upon a woman of the education, experience, and intelligence of Mrs. Dabney, and it is no answer to their inculpating effect to say that she omitted to take precautions to verify the statements, and that the falseness thereof might have been readily ascertained. *She testified that she believed them and relied upon them in advancing money and extending credit.* It is argued that in making the $600 loan to the plaintiff in error Mrs. Dabney relied upon other security than his representations, to-wit, upon the draft which he drew; but what security was

his draft? It was nothing more than his promissory note would have been, and *Mrs. Dabney testified expressly that in lending him the money she relied not upon the draft, but upon the standing of the plaintiff in error as an officer of the United States* (Emphasis ours).

In *Brafford v. United States*, 259 Fed. 511 (C. C. A. 6), the court says at page 512:

> "The motion to quash the indictment was properly overruled. The argument pressed here seems to be in substance that the mere impersonation of an officer of the United States government is not an offense under Section 32, and that the indictment is defective in failing to charge that the accused 'took upon himself to act as such inspector' and 'while so acting' obtained the property in question. But it is not necessary to a violation of the second subdivision that the accused 'take upon himself to act as such' United States officer or employe; it is only necessary that the property be obtained by the accused 'in such pretended character.' *United States v. Barnow supra.* We think the allegation that the accused did 'falsely and fraudulently obtain' the money and property 'by inducing' the automobile company to part with it, 'by falsely representing himself to be such officer and employe,' sufficiently charges that the money, etc., was fraudulently obtained 'in such pretended character.' *Littell v. United States* (C.C.A. 9) 169 Fed. 620 622, 95 C.C.A. 148."

And again at page 513:

> "The remaining ground of the motion to direct is that there was no substantial proof of the offense charged. We cannot agree with this con-

> tention * * * In the case of the Lockwood Company there was express testimony that it refused to sell plaintiff in error gasoline on Sunday, November 3d, when the shop was closed in accordance with instructions from the "Conservation Board of Fuel Directors"; that plaintiff in error thereupon displayed a badge reading "Government Inspector," with the statement that he was called upon to inspect hoof and mouth diseased cattle at a point near Hernando, Miss., and did not have sufficient gasoline to get there and back (there was undisputed evidence of subsequent admissions by plaintiff in error that he was not a government inspector); *that the company's treasurer relying upon this representation and believing that plaintiff in error was a government officer* on official business, and wanted the gasoline for use in that business, delivered to him several gallons of gasoline, taking his check dated the next day for the amount." (Emphasis ours).

In *United States v. Barnow*, 239 U.S. 74; 60 Law Ed. 155, the Supreme Court used this language, at page 80 of the U. S. Report:

> "It is the aim of the section not merely to protect innocent persons from actual loss *through reliance upon false assumptions of Federal authority*, but to maintain the general good repute and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether *one who has parted with his property upon the strength of a fraudulent representation of Federal employment* has received an adequate *quid pro quo* in value determinative." (Emphasis ours).

There is another reason why the belief of the victim in the pretense of the defendant is material to the issues in a charge under this statute. One of the elements of the offense is that the defendant "intend to defraud either the United States or any person." The "person" here mentioned is obviously the intended victim of the fraud. It probably is not necessary to prove that a fraud was consummated, but it is essential to prove that there was an intent to defraud. The fact that the fraud was actually consummated is at least some evidence of an intent to defraud. The victim's belief in the pretense, in other words, the fact that she was persuaded and convinced by the misrepresentations, is evidence that the fraud was successfully consummated.

(2) *It Was Not Error to Permit the Witness, Walter Camfield, to Testify That His Mother Referred to the Defendant as a Detective of the FBI.*

This issue is presented by appellant's assignment of error No. 6 (Tr. 185). It is predicated upon the testimony of the defendant's witness, Walter Camfield, elicited upon his cross examination. This witness was the son of Laura Camfield, one of the alleged victims in Count IV, and he was the father of Wildabelle Sorrell, the missing girl whom Haid undertook to locate for Laura Camfield. The assign-

ment of error is directed to the following testimony occurring during the cross examination of Walter Camfield: (Tr. 147, 148).

"Q. Now, did you ever talk to your mother about this matter of Mr. Haid?

A. Naturally I would.

Q. How did she refer to Mr. Haid?

* * * * *

Mr. Johnson: I object to that as being purely hearsay.

The Court: Objection will be overruled.

* * * * *

A. Okeh, she would always refer to him as a detective of the FBI."

This apparent reference to Mr. Haid by the mother was made to the witness out of the presence of the defendant. The appellant contends that it was hearsay.

This evidence was not hearsay. It was not offered to prove the truth of the statement made by the third party to the witness, i.e., it was not offered to prove the truth of the statement that Haid "was a detective of the FBI". It was offered in proof of the belief or state of mind of the declarant, Laura Camfield, i.e., to prove that she believed Haid was a detective of the FBI. That it was competent evidence for this purpose is clearly shown in 20 Am.

Jur. under the topic of "Hearsay Evidence", at page 404, Section 457, as follows:

> "*Original Evidence Distinguished.* The hearsay rule does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. In some instances, the fact that a statement was made, rather than the facts asserted in the statement, is material. The distinction in this respect for the purposes of the hearsay rule is between original evidence and pure hearsay. * * *
>
> There is no question that where a particular state of mind of a person is a relevant fact, declarations which indicate its existence are admissible as primary evidence, notwithstanding the declarant is available as a witness."

And again at page 491, Section 585:

> "Assuming that the state of mind of a person at a particular time is relevant, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party. It is clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. The truth of the statements is immaterial when offered to prove a state of mind."

The same rule is announced in *Terry v. United States*, 51 Fed. (2d) 49 (C.C.A. 4). The defendant

was convicted of a violation of the Narcotic Act. One of the assignments of error urged by the appellant is stated by the court at page 51, as follows:

> "That the District Court erred in permitting informer Harry VanMiller to testify to conversations which occurred between VanMiller and Ramsey in Jones' restaurant, because said conversations were not in the presence of appellant, Terry, and were purely hearsay."

The court answered this contention in the following language commencing at page 52:

> "The conversation objected to is as follows: 'On October 18th, about 2:30 o'clock, I met Frank Ramsey at Dick Jones' Restaurant and I asked him if he could let me have $5.00 worth of drugs and Frank Ramsey said: 'Why don't you take an ounce — I have just one ounce left'; and I told Frank Ramsey that I did not have enough money at the time'.
>
> In considering this contention, it is pertinent to determine whether or not the conversation between VanMiller and Ramsey on the occasion in question and under the circumstances disclosed by the record is in fact violative of the hearsay rule.
>
> In 3 Wigmore on Evidence, Sec. 1768 (pages 2274, 2275), the author says:
>
> 'The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall *without* the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use. The theory of the Hearsay rule

(ante, Sec. 1361) is that, when a human utterance *is offered as evidence of the truth of the fact asserted in it*, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand and subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, *not as an assertion to evidence the matter asserted, but without reference to the truth of the matter* asserted, the Hearsay rule does not apply. (Italics supplied.)'

'The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such.* If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted.'

* * * * *

That the conversation between VanMiller and Ramsey, objected to, is *without* the inhibition of the Hearsay rule, defined above is apparent. It was not offered as evidence of the truth of any fact asserted in the conversation."

The same rule is recognized by the Supreme Court in *Shepard v. United States*, 290 U.S. 96. In this case the defendant had been convicted of the murder of his wife by poison. The defense was that her death was suicide. During the trial the government offered evidence that the deceased wife had stated to the witness, "Dr. Shepard has poisoned me." This testimony was offered and admitted on the

theory that it was a dying declaration. However, on the appeals it was admitted by the government and held that it was not admissible as a dying declaration because the statement was not made under the conditions requisite to a dying declaration. The government then urged that it was admissible nevertheless, not in proof of the truth of the statement, but to show a will to live on the part of the declarant, and thus to counteract the defense testimony tending to indicate suicide. The court held the statement inadmissible and reversed the conviction on the ground that the statement did not tend to show a will to live, and that its only effect could be to show the fact of the poisoning.

In discussing the applicability of the rule in question Justice Cardozo, speaking for the court, said beginning at page 103 of the U. S. Report:

> "The defendant had tried to show by Mrs. Shepard's declarations to her friends that she had exhibited a weariness of life and a readiness to end it, the testimony giving plausibility to the hypothesis of suicide. Wigmore, Sec. 1726; *Commonwealth v. Trefethen*, 157 Mass. 180; 31 N.E. 961. By the proof of these declarations evincing an unhappy state of mind the defendant opened the door to the offer by the Government of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the Government put in evidence, however, was something

> very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband."

The statement by the witness, Walter Camfield, that his mother referred to Haid "as a detective of the FBI" was therefore admissible to show not the truth of the statement, but her belief or state of mind. It comes within the rule we have been discussing, and was not hearsay, as the appellant contends. As to its materiality the cases cited herein under the first question discussed are authority.

CONCLUSION

All of the testimony admitted to which the appellant objects was properly admitted under well recognized rules of evidence. Its admission was not error.

The record is replete with evidence of a studied course of pretense, misrepresentation and assumption of official authority by the defendant over a period of more than a year. There was no substantial evidence contradicting the government's case, except the testimony of the defendant himself and his wife,

which the jury had every right to disbelieve, and they apparently did.

There being no error the judgment should be affirmed.

Respectfully submitted,

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